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No. 565

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

MONROE AUTO EQUIPMENT COMPANY,
a Michigan corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Monroe Auto Equipment Company, prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Seventh Circuit, entered on August 3, 1965.

OPINIONS BELOW.

The opinion of the court below is printed as Appendix A hereto; its Decree is printed as Appendix B. The decision and order of the Federal Trade Commission appear at Pages 16 through 61 of the printed Appendix furnished by Petitioner for the use of the court below (here called "App"), of which nine copies are filed herewith.

JURISDICTION.

The final decree of the Court of Appeals for the Seventh Circuit was entered on August 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether a holding that an "economic benefit" resulting from common ownership is a "price discrimination" is unsound and so indefinite as to be unworkable.

2. Whether the use of "indirect purchaser" fiction is warranted when the charge is that a price discrimination resulted from common ownership among purchasers.

3. Whether injury to competition within the meaning of Section 2(a) results from common ownership.

4. Whether a finding that an economic benefit which injured competition could be supported by the record here.

5. Whether the Commissioner's order is so unclear and imprecise as to make compliance impossible.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *

STATEMENT.

The Federal Trade Commission's complaint (App. 2) charged Monroe Auto Equipment Company ("Monroe") with violating subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15 U.S.C. §13(a)) by discriminating in price between different purchasers of its automotive products. This complaint was different from each of the many others which preceded it in the automotive industry; and in upholding it, the Seventh Circuit has carried price discrimination concepts far beyond their previous borders.

Monroe is engaged in the manufacture and nation-wide distribution of a line of automotive replacement products, including shock-absorbers, sway bars, load levelers, power steering components and related products; its sales are substantial, exceeding $28,000,000 annually. Monroe sells its products only to warehouse distributors, charging them all the "jobber net" price, and allowing a 20% discount on reported sales to jobbers approved by Monroe. Jobbers in turn purchase from the warehouse distributors, paying the "jobber net" price (App. 66-68).

Warehouse distributors (WD's) resell only to jobbers. Jobbers are engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade servicing the general public (App. 67). Thus, WD's and jobbers do not compete with one another.

The complaint charged, and it was stipulated, that among the warehouse distributors to whom Monroe sells are some "who own, or control," jobber establishments which have been approved by Monroe; and Monroe allows these warehouse distributors the regular 20% discount on sales to jobbers thus affiliated with them (App.

4, 67). It was the theory of the complaint that: (1) Monroe exercised a control over the relationship between the warehouse distributors and the jobbers which made the latter "in all essential respects" purchasers from Monroe; and (2) That Monroe's granting a discount to its direct purchaser, the warehouse distributor, on sales to jobbers under common ownership with it,[1] "results" in a more favorable price to the affiliated jobbers than to jobbers not affiliated with a warehouse distributor (App. 4, 5).

Testimony taken at the hearing developed different degrees of affiliation between warehouse distributors and jobbers. For example, R. T. Clapp Company, a warehouse distributor customer of Monroe's, owns all of the stock of one jobber company, and a controlling interest in another, to both of which it sells Monroe products (App. 90 *et. seq.*). Another warehouse customer, TVK, also owns part or all of the stock of jobber companies. In the case of Harts Automotive, Mr. Hart was President, Chairman of the Board, and controlling stockholder of the warehouse and a majority stockholder in several jobber corporations (App. 76 *et. seq.*)

There was also testimony which showed that each warehouse distributor was managed in its own interests as an independent business; selected lines of merchandise deemed desirable by its management; purchased and stocked merchandise as required by its market area; actively promoted sales on behalf of its suppliers among all reputable, potential jobber customers in its market area; and sold and served all of its customers on the same terms and without favor to jobbers in some way affiliated with it (App. 77; 83; 84; 88; 89; 91; 101).

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[1]Jobbers associated in some form of common ownership with W.D.'s. will be called "affiliated" jobbers here.

Similarly, the affiliated jobbers purchased from warehouse distributors at the same price as unrelated jobbers, and conducted their own separate business of their own purposes. Nothing in their purchasing from the warehouse distributor placed them in a better position than any of their competitors (App. 80; 82; 84; 85; 102; 106).

The Hearing Examiner in his Initial Decision recognized that "Except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record" (App. 13). The Commission found a violation of Section 2(a) by reasoning that: (1) The jobbers are "indirect purchasers" from Monroe; and (2) Monroe's granting a discount to a WD on sales to its affiliated jobbers would "in the light of business realities," result in a "direct benefit" to the jobbers (App. 25). It did not spell out the nature of this "benefit" to the jobbers (App. 25) nor indicate what degree of affiliation would give rise to this supposed benefit.

REASONS FOR GRANTING THE WRIT.

As Commissioner Elman pointed out in a sharp dissenting opinion, the Commission's order "forbids respondent to grant its warehouse distributors any compensation, however slight, on resales to affiliated jobbers"; he added that the conclusion "is supportable under no tenable theory of Robinson-Patman Act liability" (App. 43). The Commission here for the first time adopted *a principle of law* to the effect that an unspecified legal benefit resulting from ownership affiliation is equivalent to a price discrimination within the meaning of the Robinson-Patman Act. The established law is to the contrary: price discrimination under the Act has always been considered, by the bench and bar, as a *price difference* (*Anheuser-Busch* v. *Federal Trade Commission*, 363 U.S. 536, 548 (1960); Rowe, *Price*

Discrimination Under the Robinson-Patman Act (1962) Page 31).

In affirming the Commission, the Seventh Circuit has in effect adopted a *per se* rule prohibiting common ownership or affiliation between warehouse and jobbers. This blanket condemnation of any relationship between them is not only unprecedented, but unrealistic and unsound. In the circumstances, review by this Court is required.

1. The holding that an "economic benefit" resulted from common ownership is not only unprecedented and unsound, but is so vague and indefinite as to be unworkable.

The Commission found that an economic benefit resulted from the WD allowance to a jobber-affiliated buyer; this may properly have been a question of fact. The Commission then took a second step, and concluded *as a matter of law* that this "economic benefit" is a price discrimination within the meaning of the Robinson-Patman Act. The legal question presented was: Assuming for the sake of argument that an economic benefit was confered by common ownership, is this a price discrimination under Section 2(a)?

The Court of Appeals for the Seventh Circuit upheld the Commission's finding of fact, and affirmed on that ground alone, without discussion of the legal questions involved. That Court's basic misunderstanding of the problem is demonstrated by two sentences in its opinion, in which it states a question of law and follows with a non-sequitur as to fact:

> "In this court, Monroe contends that the Commission erred in equating an (assumed) economic benefit arising from common ownership with a price discrimination under section 2(a). We are required to accord conclusive effect to the Commission's findings of facts, if supported by substantial evidence." (Appendix A).

By supporting the Commission's finding of fact while ignoring the legal principle involved, the Court of Appeals has left the law in a state of complete confusion. In the automotive replacement industry, distribution systems based on redistribution allowances have proved to be efficient, and are commonly used.[2] Yet the decision here has made it almost impossible for counsel to advise manufacturers and wholesalers of the circumstances under which such allowances may legally be made.

These allowances are granted to the manufacturer's customer on redistribution made by the customer. And according to the decision here, their legality depends upon the relationship between the customer and a third person—the customer's customer. Would a redistribution allowance be illegal if these two are related as parent and wholly owned subsidiary? Partially owned subsidiary? If one individual owns a controlling share of each? If he owns a minority interest in each? And how is the seller to determine the existence and degree of these relationships among the purchasers of his product—direct and "indirect"?

The Seventh Circuit's blanket condemnation of ownership affiliation would appear to require a manufacturer to investigate the possible existence of some or all of these varying degrees of common ownership as between each of its customers and the customers' customers. That this would be impossible in the case of a nation-wide distributor is emphasized by the facts in this case. The parties stipulated that Monroe's sales exceed $28,000,000 annually, and are made to approximately 300 warhouse distributors who resell to approximately 11,000 jobbers; and that "among Monroe's purchasers" are "certain" warehouse

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[2] As Commissioner Elman pointed out, this system has become standard in the industry (App. 34).

distributors who own or control jobbers (App. 66, 67). The testimony taken at the hearing developed several examples of common-ownership situations. Although no exact figures are available, it is apparent that the amounts involved in sales to these warehouse distributor customers for resale to affiliated jobbers are small in comparison with Monroe's total sales.

The Commission, now affirmed by the Seventh Circuit, began and ended with the proposition that there is a price discrimination if there is "sufficient identification of the WD with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other." (App. 19). Its announced test was that, as between the WD and the affiliated jobber, "*any benefit* conferred upon one would in the light of the business realities shown on the record, result in a direct benefit to the other. • • • these facts *amount to a prima facie showing of price discrimination* among competing customers." (App. 25; emphasis supplied).

This is a unque proposition in antitrust law, and the Commission accordingly was unable to support it by citation of any authority in point.[1] The Commission relied on *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952), which, as Commissioner Elman pointed out (App. 45-47) is inapplicable. *Ruberoid* involved sales directly to various classifications of customers, and the misclassification of those customers by ignoring the functions performed by them, resulting in actual dollars and cents discrimination between Ruberoid's competing customers. This is a different situation entirely.

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[1] The Court of Appeals solved this difficulty by completely ignoring the legal question presented by the appeal.

The Court of Appeals distinguished two of its own opinions which would have dictated a contrary conclusion from that reached by it, on the grounds that they were decided under other sections of the Robinson-Patman Act. While this is true, the distinction is not a decisive one. (And, in our opinion, it is a distinction without a difference.)

Nuarc Company v. *Federal Trade Commission*, 316 F2d 576, 582 (7th Cir., 1963), was concerned with a charge under Section 2(d) of the Act, prohibiting payments for services or facilities furnished by one customer unless similar payments are made available to all other customers. It held that a supplier's payment, for advertising in a publication owned, controlled and managed by the same person who owned, controlled and managed one of the supplier's customers, was not a payment for the benefit of that customer in violation of Section 2(d). The opinion pointed out that:

> "The only benefit that could have possibly accrued to Foster Type was through the indirect route of profits from the printing business accruing to Borowsky—the owner of both enterprises. *This without more, cannot be the basis of a Section 2(d) violation.* A contrary decision would operate as a compulsory divestiture for any owner of an advertising medium that also engaged in a separate enterprise selling products advertised in his publication." (Emphasis supplied.)

Central Retailer-Owned Grocers, Inc. v. *Federal Trade Commission*, 319 F2d 410, 415 (1964), the second of its own decisions which the Seventh Circuit distinguished, held that ownership of a distributor by grocers does not necessarily make unlawful, under Section 2(c) of the Act, brokerage payments made to the distributor on pur-

chases for those grocers. Pointing to the facts which showed that the distributor performed the legitimate brokerage functions, the Court said:

> "Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale price to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chain stores."

2. The use of the "indirect purchaser" fiction is unwarranted when the charge is that a price discrimination resulted from common ownership among purchasers.

Section 2(a) prohibits discrimination in price between different "purchasers" of commodities. Traditionally, it has been considered that the Act means what it says, and that the "term purchaser means simply one who purchases, a buyer, a vendee" (*Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F2d 331, 333 (3rd Cir., 1939). Certainly the literal text of the Act does not include the seller's customer as a "purchaser" (Rowe, Price Discrimination Under the Robinson-Patman Act, (1962) Pages 58-59).

The Federal Trade Commission, affirmed in a few cases by courts of appeal, has engrafted its own qualification onto the literal text of the Act—as Commissioner Elman puts it, a "gloss on the statute'" (App. 39). This implantation is that the manufacturer's retention of varying degrees of control over the terms of resale, and direct contact by him with his customer's purchaser, will transmute the latter (by legal fiction) into an "indirect purchaser" from the manufacturer. (*American News Co.* v. *Federal Trade Commission*, 300 F2d 104, 107 (2nd Cir. 1962) *cert. den.* 371 U. S. 824 (1962).

The use of this fiction has previously been restricted to two kinds of cases: Those in which its use is necessary

to correct a drastic evil, as the "misuse of the economic power of large buyers" found in *American News;* or, where the manufacturer sells to different customers at different prices, and competing purchasers pay different amounts in dollars and cents, as in *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir., 1956), *cert. den.* 355 U.S. 941 (1958).

Neither of these reasons for importing a legal fiction into the decision was present here, and its use was entirely unwarranted. Monroe's system of distribution contains no built-in price differences, and in fact was designed to avoid discrimination.

Monroe sells only to warehouses, and redistribution allowances are paid to them only upon resale to businesses performing a genuine jobber function. Warehouse distributors compete with one another, and not with jobbers, who in turn all pay the same price. The only price difference is between persons at different levels of competition (i.e., those who sell to jobbers and those who sell as jobbers to the retail trade). As Commissioner Elman remarked, "Apparently, few manufacturers use so simple—and, from the Commission's standpoint, one might suppose, so innocent—a system as the present respondent * * *" (App. 36).

Traditionally, legal fictions are used with restraint. Following this pattern, the "indirect purchaser" doctrine has previously been applied by the courts in circumstances in which the buyer or seller took direct discriminatory action, resulting from a choice by him in a particular instance. It has not and should not be used when a one-price seller simply followed his normal (and legal) distribution pattern, and there is no price discrimination except such as may result from private ownership arrangements on the part of the purchaser.

3. Injury to competition within the meaning of Section 2(a) does not result from common ownership alone.

Section 2(a) of the Robinson-Patman Act prohibits price discrimination when "the effect of such discrimination may be to substantially lessen competition," and without proof of that effect the Government's case must fall. In this case, the injury alleged is to unaffiliated jobbers competing with affiliated jobbers. The basic inquiry here, and one of which both the Commission and the Seventh Circuit lost sight, is whether any economic advantage accruing through common ownership is the kind of competitive advantage which the Robinson-Patman Act was intended to forbid. Once again, the Seventh Circuit merely affirmed the Commission on an issue of fact, and ignored the question of law involved.

Section 2(a) is intended to protect *competition* rather than individual competitors. "Anti-trust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." (*Atlas Building Products Co.* v. *Diamond Black & Gravel Co.*, 269 F2d 950, 954 (10th Cir., 1959), cert. den. 363 U.S. 843 (1960).

This injury to competition flowing from price discrimination has always been a matter of a price difference in dollars and cents—and that, indeed, is a difference which can be readily measured and understood; its impact is direct and easily demonstrated. On the other hand, any advantages which may accrue to stockholders or other business investors, ownership of stock or other interests in more than one business, are not and should not be cognizable in law as a price discrimination within the meaning of the Robinson-Patman Act. Such advantages are properly for consideration primarily by economists. These

benefits, if any, are simply not measurable with the precision required by a price discrimination statute. Nor have they to date been outlawed by the Robinson-Patman Act.

4. The Record here does not support the Commission's finding that affiliation resulted in an economic benefit, or that such a benefit could injure competition.

As Commissioner Elman pointed out in his dissenting opinion, the "notion of 'benefit' has no factual content" (App. 41). That opinion summarized:

> "If the record in the present case showed that any of respondent's warehouse distributors in fact was merely a front for a jobber affiliate, or that any distributor was in fact himself selling as a jobber, the Commissions position would derive support from the decisions. *But the record affirmatively shows the contrary*" (App. 48).

5. The Commission's Order is so unclear and imprecise as to make compliance impossible.

The Commission's orders must be, "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application". *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962).

Commissioner Elman's dissenting opinion spells out the objections to the present order at Pages 36 to 38 of the Appendix.

CONCLUSION.

Commissioner Elman put the matter succinctly: "Nothing in the existing law of Section 2(a) justified what is in effect a per se rule barring a warehouse distributor from selling a jobber with which it is affiliated in the manner shown on this record."

We submit that the Commission and the Seventh Circuit have carried the law in a matter of nation-wide significance to a point not contemplated by Congress, and that the intervention of this Court is required.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14824 September Term, 1964 April Session, 1965

Monroe Auto Equipment Company, a Michigan corporation, Petitioner,
v.
Federal Trade Commission, Respondent.

Petition to Review an Order of the Federal Trade Commission.

June 16. 1965

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*.

Schnackenberg, Circuit Judge. Monroe Auto Equipment Company, a Michigan corporation, petitioner, by its petition asks us to review and set aside an order of the Federal Trade Commission which commanded Monroe to cease and desist from discriminating in the price of automotive products of like grade and quality, in commerce, by selling same to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price, in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (a).[1]

By its complaint, the Commission alleges that Monroe sells automotive products in the so-called "after market",

[1] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, • • •

which is classified by Monroe into "warehouse distributors (WDs)" and "jobbers". It sells directly only to WDs who normally resell only to jobbers. The complaint alleges that WDs purchase from Monroe at "Suggested Net Jobber Cost Sheet" prices and that, under the terms of a WD agreement, they receive a 20% allowance on all such sales to jobber reported by them to Monroe. Monroe grants such an allowance to WDs only on sales to jobbers who have signed contracts approved by Monroe and on sales made at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet".

Monroe sells to about 300 customers classified as WDs, in the United States.

A jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade. Such a jobber signs a "Monroe Auto Equipment Company Jobber Agreement" with a WD, and such agreement is approved and signed by Monroe.[2]

The complaint concludes that the effect of such price discriminations may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition, in violation of § 2 (a) aforesaid.

The charges in the complaint are denied by Monroe in its answer, which also sets up as a defense that if any price differentials exist they are justified by a due allowance for differences in cost or have been made in good faith to meet an equally low price of a competitor. However these defenses were not pressed and are not now live issues.

([1] Continued)
where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *.

[2] There are approximately 11,000 such jobber-purchasers in the United States.

The parties stipulated many of the basic facts and the testimony of Monroe's vice-president Bickel, in charge of merchandising, was received. Subsequently, on his own motion, the examiner reopened the record and the testimony of four witnesses was taken and documentary exhibits were introduced.

Thereafter the record was closed and, the parties having submitted proposed findings, an initial decision, finding the facts, was filed by the examiner, in which he concluded that Monroe had violated the law as alleged and directed issuance of an order to cease and desist.

In addition to the stipulated facts, which are incorporated in his decision, the examiner's findings, as summarized, are as follows: The evidence established a course of dealing by the petitioner, its WDs and its jobbers, which result in an "indirect purchaser" relationship between Monroe and the jobber-purchasers of its products, resulting in direct dealings between Monroe and the jobbers and Monroe's fixing of prices, terms and conditions of sale. He held that, even though certain of the affiliated WDs and jobbers were separate corporate entities, the effect of the relationships between them was that the jobbers received the benefit of WD allowances and that a failure to disregard the corporate entities would permit certain customers of Monroe a price advantage over their competitors which would violate the statute of the corporate device were absent.

The examiner found that Monroe's granting of the 20% WD allowance on "so-called 'sales' " to jobbers owned or controlled by WDs and indirectly to jobbers who owned or controlled WDs, resulted in price discriminations far in excess of the average net profit usually earned by automotive parts jobbers. He then concluded that discriminations of such magnitude necessarily enhanced the competitive opportunities of the favored purchasers and that their effect "may be substantially to lessen competition, or to injure, destroy, or prevent competition" in violation of section 2 (a).

On appeal by Monroe, the Commission heard the matter on briefs and oral argument, and by its decision modified the examiner's decision. While agreeing with the examiner's application of the "indirect purchaser" doctrine to transactions between Monroe and independent jobbers not affiliated with a WD, the Commission rejected this doctrine as to Monroe's dealings with affiliated WD jobber entities and found instead that the latter were direct purchasers from Monroe. Treating, as the "sole remaining question", whether there was sufficient evidence of identification of the WDs with their jobbers to give rise to the conclusion that a discount given to one will enure to the benefit of the others, the Commission examined the testimony, made findings, and concluded that "for all practical purposes" these organizations operate as a single unit so that any benefit conferred on one would, in the light of the business realities shown on this record, result in a direct benefit to the other.

The Commission considered Monroe's rebuttal evidence and concluded that it had "fallen short of the mark".

Having modified and supplemented the initial decision, it was then adopted as the decision of the Commission.

In this court, Monroe contends that the Commission erred in equating an (assumed) economic benefit arising from common ownership with a price discrimination under section 2 (a). We are required to accord conclusive effect to the Commission's findings of facts, if supported by substantial evidence. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 487. There is such substantial evidence in this record[3] that Monroe sold to direct-buying WD-jobber entities for redistribution through affiliated

[3] An illustrative situation is that of Hart's Automotive Parts Company, Inc., of which R. Henry Hart, Jr. was president and controlling stockholder. Hart's was engaged in warehousing and distributing automotive parts to all classes of automotive customers, with its main office located at 1230 Market Street, Chattanooga, Tennessee. At this address, according to the witness, the company functioned as a WD under the name of Auto Parts Warehouse Company, and maintained a sales counter for

jobber outlets at an allowance of 20%, while independent jobbers, in competition with these same outlets in the resale of Monroe products, were required to pay regular jobber prices on their "indirect purchases" from Monroe through WDs.

In this court Monroe relies on *Nuarc Co.* v. *Federal Trade Commission,* 7 Cir., 316 F.2d 582 (1963), where we set aside an order entered by the Commission finding that Nuarc had violated § 2 (d) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (d). *Nuarc* is not controlling here for at least two reasons; first, it involved a § 2 (d) proceeding and secondly, the evidence in *Nuarc* did not support the order of the Commission, as we held in that case.

Petitioner contends that the "Government's case must fall" because a "probative analysis" of the facts in the case fails to show a causal relationship between price dis-

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([2] Continued)
servicing the jobber trade. At the same time, it maintained another sales counter in the same building for selling as a jobber to the dealer trade. Within Chattanooga itself, the company operated three unincorporated branches (in addition to the main office), each of which functioned soley as a jobber, obtaining their products from Harts' central office warehouse.

In addition to Harts' Chattanooga operations, Mr. Hart testified that outside that city it maintained four jobber corporations, all named Hart's Automotive Parts Company, *viz.,* at Dalton, Georgia, with a branch at Chatsworth; at Cleveland, Tennessee; at Maryville, Tennessee, with a branch at Madisonville; and at Harriman, Tennessee, with a branch at Rockwood. The Commission found that each of these corporations had likewise been signed by Hart's Chattanooga headquarters to Monroe-approved jobber contracts. Mr. Hart acknowledged that each of them, with one exception, was opened with capital supplied primarily by himself, and that he derived his basic income from the Hart's Automotive operation. In each of these corporations, again with one exception, the witness testified that he was majority stockholder, as well as president and chairman of the board.

criminations and an actual or reasonably probable injury to competition. However, as we said in *E. Edelmann & Co.* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152, at 154:

> "* * * The test of injury to competition has been formulated in various ways. In the Corn Products case, 324 U.S. at page 738, * * * the Court stated, 'The use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.' Later in the opinion, however, 324 U.S. at page 742, * * * the Court stated, 'As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' ***"

([3] Continued)

He stated that monthly meetings were held in Chattanooga, which were attended by the store managers and their salesmen.

Mr. Hart likewise testified that the general books of all out-of town companies were kept in Chattanooga, and that Hart's employed two full-time bookkeepers and one part-time for this purpose. He explained that while each company wrote its own daily invoices, their monthly billing statements were forwarded to purchasers from Chattanooga. In addition, he stated that while each jobber had a local bank account, only four persons were authorized to sign checks on their behalf, with at least two signatures required; Mr. Hart, Mr. Johnson, vice-president, the head bookkeeper in Chattanooga, and each respective store manager.

The witness also testified that the stockholders' meetings for all the various Harts' corporations were held at the central office in Chattanooga on the same day, and that a consolidated balance sheet covering all operations was prepared.

Mr. Hart additionally pointed out that his salesmen were paid no commission on "sales" by Chattanooga to its affiliated jobber stores.

We hold that, in the case at bar, according to the proper competitive injury criteria, the Commission properly affirmed the examiner's finding that petitioner's discriminatory allowances would be likely to result in the requisite anticompetitive effects proscribed by the Act.

Petitioner seeks to rely on our recent holding in *Central Retailer-Owned Grocers, Inc.* v. *Federal Trade Commission*, 319 F.2d 410 (1963), as to which no petition for certiorari was filed in the United States Supreme Court. However, in *Central*, the Commission in its complaint took the position that the sums Central received and accepted from certain of its suppliers constituted brokerage or allowances in lieu of brokerage, in violation of § 2 (c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (c). It was upon that theory alone that the case was submitted to and decided by us. No such theory has been asserted in the case at bar; our holding in Central is inapposite here.

Lastly, we cannot see any unclearness or imprecision in the Commission's order the terms of which are so unmistakable and unequivocal as to have produced two able briefs in this court by learned counsel for petitioner.

From our examination of the entire record, we hold that the findings and conclusions of the examiner, as modified, supplemented and adopteed by the Commission, are supported by the evidence in the record and the principles of law pertaining thereto. Therefore, the order of the Commission should be and is affirmed, and will be enforced by this court.

Order Affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Monroe Auto Equipment Company, Petitioner, v. Federal Trade Commission, Respondent.	No. 14,824

FINAL DECREE AFFIRMING AND ENFORCING ORDER to CEASE AND DESIST
(Filed Aug 3 1965)

Monroe Auto Equipment Company, a corporation, petitioner herein, having filed in this Court on October 2, 1964, a petition to review and set aside an order to cease and desist issued against it on July 28, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Monroe Auto Equipment Company, a corporation, Docket 8543;" and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on May 3, 1965, and this Court having rendered its decision on June 16, 1965:

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

It Is Further Ordered, Adjudged and Decreed that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

By the Court.

/s/ Elmer J. Schnackenberg
Elmer J. Schnackenberg
United States Circuit Judge

/s/ Latham Castle
Latham Castle
United States Circuit Judge

/s/ K. P. Grubb
Kenneth P. Grubb
United States District Judge

Entered: Aug 3 1965

A True Copy:

Test:

/s/ Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 565

MONROE AUTO EQUIPMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–7a) is reported at 347 F. 2d 401. The opinion and order of the Federal Trade Commission (Pet. App. 15–60) [1] have not been officially reported.

JURISDICTION

The order of the court of appeals affirming the Commission's order was entered on June 16, 1965, and the final decree enforcing that order was entered on August 3, 1965 (Pet. 8a–9a). The petition for a writ of certiorari was filed on September 13,

[1] "Pet. App." refers to the appendix to petitioner's brief filed in the court below.

1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Commission's findings (a) that petitioner discriminated in price in granting affiliated warehouse distributor-jobber purchasers the 20% warehouse distributor discount on products which they purchased for resale at the jobbing level, while competing independent jobbers were required to purchase at prevailing jobber prices; and (b) whether the effect of this practice may be substantially to lessen competition in violation of Section 2(a) of the amended Clayton Act.

2. Whether the Commission's cease-and-desist order was appropriate to prevent the continuation of the unlawful practice found, or was unduly vague and imprecise.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

The Federal Trade Commission instituted proceedings against petitioner, Monroe Auto Equipment Company ("Monroe"), on November 5, 1962, charging that the 20% allowance which it granted to affiliated warehouse distributor-jobber entities on "sales" by such warehouse distributors ("WDs") to their own jobbing outlets constituted price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[2]

Many of the basic facts in this proceeding are not in dispute and were stipulated, as follows: Monroe manufactures and distributes a line of automotive products consisting chiefly of shock absorbers, sway bars, load levelers, and power-steering components. It sells these products to approximately 300 WDs, who in turn sell them to approximately 11,000 jobbers for distribution to garages, gasoline stations and other customers servicing the general public. WDs purchase from Monroe at its suggested "net jobber" prices and resell to jobbers at the same prices, receiving a 20% allowance on sales to "approved" Monroe jobbers (Pet. App. 66–67).

---

[2] Petitioner's answer denied the charges and raised the defenses of "cost justification" and "meeting competition" (Pet. App. 6). But as the court below noted "these defenses were not pressed and are not now live issues" (Pet. 2a).

Certain of petitioner's WD customers own or control jobbing outlets classified by petitioner as "approved" jobbers. On "sales" of Monroe products by these WDs to such outlets, petitioner grants the regular 20% WD allowance. Similarly, Monroe has recognized as WDs certain organizations owned or controlled by "approved" Monroe jobbers. On sales by such WDs to their jobber-owners, Monroe likewise grants the WD allowance. In both of these described situations, the jobbers or jobbing outlets involved are in active and substantial competition in the resale of Monroe products with jobbers having no WD affiliation, who purchase from WDs at the regular suggested jobber prices (Pet. App. 67–68).

The auto parts jobbing business is highly competitive and is characterized by narrow net profit margins ranging usually between 1% and 5%, averaging less than 4%. Illustrative of the competitive situation is the fact that the 2% cash discount normally allowed by auto parts suppliers is important to jobbers in determining their profit margins and in the successful operation of their businesses (Pet. App. 68).

Following full administrative hearings, at which evidence to supplement the stipulated facts was adduced by Commission counsel with regard to (1) the commercial relationships existing between Monroe and its "approved" jobbers, and (2) the organization and operation of representative WD–jobber entities, the Commission found that the charges were sustained. In so finding, the Commission concluded that (1) an "indirect purchaser" relationship existed

between petitioner and unaffiliated "approved" jobbers, and (2) that the affiliated WD-jobber organizations were "direct purchasers," since "for all practical purposes" they were operated as single business units, so that any benefits conferred on one aspect of the operation would "in the light of the business realities shown on this record," result in a direct benefit to the other (Pet. App. 19, 25).[3] It further concluded that these facts "amount to a prima facie showing of price discrimination among competing customers" which Monroe had failed to rebut (Pet. App. 25). The Commission adopted the examiner's conclusion that the effect of this discriminatory practice may be substantially to lessen, injure, destroy or prevent competition with the nonfavored jobbers in violation of Section 2(a) of the amended Clayton Act (Pet. App. 13). A cease-and-desist order was entered directing Monroe to cease discriminating in price by "selling * * * to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price" (Pet. App. 15).

The court of appeals unanimously affirmed (Pet. 1a–7a). It found that there was "substantial evidence in this record that Monroe sold to direct-buying WD-jobber entities for redistribution through affiliated jobber outlets at an allowance of 20%, while independent jobbers, in competition with these same

[3] The hearing examiner, reaching the same result, found that all "approved" Monroe jobbers, both independent and affiliated, were "indirect purchasers" (Pet. App. 14–15).

outlets in the resale of Monroe products, were required to pay regular jobber prices on their 'indirect purchases' from Monroe through WDs" (Pet. 4a–5a). It further held that "according to the proper competitive injury criteria, the Commission properly affirmed the examiner's finding that petitioner's discriminatory allowances would be likely to result in the requisite anticompetitive effects proscribed by the Act" (Pet. 7a).

ARGUMENT

The decision below is correct and the petition presents no question warranting review by this Court.

1. Petitioner contends that the court of appeals erred in upholding the Commission's finding that *as a matter of law* an "economic benefit" resulting from common ownership of a WD-jobber enterprise constitutes price discrimination under the statute. But the Commission made no such finding. The issue presented for review, as the court properly recognized, was whether *in fact* the WD-jobber entities in the record were so organized and operated that they constituted single business units and thus "direct purchasers" from Monroe. In this respect the Commission concluded that the evidence demonstrated such unity of identity that "a discount to one arm of the entity must naturally flow to and benefit the other arm of the entity." The court held this finding to be supported by substantial evidence, such as that discussed in note 3 of its opinion (Pet. 4a–6a).[4] The

[4] The court cited the "illustrative situation" of Hart's Automotive Parts Company, Inc., of which one individual, R. Henry Hart, Jr., was president and controlling stockholder. At this

sufficiency of the evidence is a question "which Congress has placed in the keeping of the Courts of Appeals." *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

2. Petitioner's contention that the Commission and the court have "in effect adopted a *per se* rule prohibiting common ownership or affiliation between warehouse and jobbers" is without merit (Pet. 6). Neither decision in any way inhibits an organization from acting both as a WD and as a jobber of automotive parts. But the law is clear that when such organizations purchase for resale at the jobber level, a manufacturer may not discriminate in their favor where injury to competing jobbers may result. This Court recognized this principle in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475.

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company's main office in Chattanooga, it "functioned as a WD" and also "maintained a sales counter for servicing the jobber trade. At the same time it maintained another sales counter in the same building for selling as a jobber to the dealer trade. Within Chattanooga itself, the company operated three unincorporated branches (in addition to the main office), each of which functioned solely as a jobber, obtaining their products from Hart's central office warehouse." In addition, the court noted that outside Chattanooga Hart's "maintained four jobber corporations, all named Hart's Automotive Parts Company," and that these too were "approved" Monroe jobbers. The court further observed that "Mr. Hart acknowledged that each of them, with one exception, was opened with capital supplied primarily by himself, and that he derived his basic income from the Hart's Automotive operation." The court went on to discuss various organizational and operational details, making it additionally clear that the Commission was well justified in finding that Hart's was a "single business enterprise." For similar examples, see the Commission's discussion of the R. T. Clapp and TVK companies at Pet. App. 23–24.

Moreover, the Commission has time and again issued cease-and-desist orders in "dual distribution" cases of this type.[5] This consistent administrative construction and application of the statute is entitled to "great weight." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391.

3. The court of appeals approved the Commission's ruling that independent jobbers who purchased from non-affiliated WDs were nevertheless "indirect purchasers" from Monroe within the meaning of Section 2(a). The Commission frequently has relied upon the "indirect purchaser" doctrine in dealing with persons operating at different levels in the distributive process,[6] and the courts have upheld such use of the doctrine. *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109 (C.A. 2), *certiorari denied*, 371 U.S. 824; *Purolator Products, Inc.* v. *Federal Trade Commission*, — F. 2d —— (C.A. 7), No. 14704, decided October 22, 1965. *Cf. Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2), *certiorari denied*, 331 U.S. 806; *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310,

[5] See, for example, *Hansen Inoculator Co.*, 26 F.T.C. 303; *Albert L. Whiting*, 26 F.T.C. 312; *Nitragin Co.*, 26 F.T.C. 320; *American Oil Co.*, 29 F.T.C. 857, 864–65 (1939); *Sherwin Williams Co.*, 36 F.T.C. 25; *Firestone Tire & Rubber Co.*, 55 F.T.C. 1759, 1761; *E. Edelmann & Co.*, 51 F.T.C. 978, 1001, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

[6] *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537; *Luwor, Ltd.*, 31 F.T.C. 658; *Dentists' Supply Co.*, 37 F.T.C. 345; *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *E. Edelmann & Co.*, 51 F.T.C. 978, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

312 (S.D. N.Y.). In the *American News* case the court ruled that, in determining whether a seller had violated Section 2(d) of the Robinson-Patman Act by giving a favored customer promotional allowances not made available to its other customers on proportionately equal terms, the Commission properly treated the favored customer, who purchased from the seller's wholesalers, as an indirect purchaser from the seller. The court stated (300 F. 2d 109): "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys."

In the present case, petitioner challenges the application of the indirect-purchaser doctrine on the ground that it may be appropriately used only where necessary to correct such drastic evils as the misuse of the economic power of large buyers, or where the price discrimination takes the usual form of selling to different customers at different dollar-and-cents prices (Pet. 10–11). There is no warrant for the limitation that petitioner suggests. *American News Co., supra.* In the present case the Commission properly found that such relationship existed from an examination of "the contracts between the WDs and Monroe, the contract between the WDs and jobbers, and the testimony in the record with respect to these agreements" (Pet. App. 18).

4. This Court long ago established that the Commission is warranted in finding injury to competition

within the meaning of Section 2(a) from evidence that a manufacturer charged one buyer a lower price for goods than it afforded the purchaser's competitors for goods of like grade and quality. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47. In that case the Court stated (at pp. 50–51):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. * * * It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitiors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

As *Morton Salt* has been consistently applied in the Commission's automotive parts cases, the requisite competitive injury may readily be inferred from substantial price discriminations which occur in a keenly competitive market characterized by narrow profit margins. *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 154 (C.A. 7), *certiorari denied*, 355 U.S. 941; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 254–255 (C.A. 7),

certiorari denied, 353 U.S. 938. Each of these factors is present in the instant proceeding. The discriminatory WD allowance of 20% is plainly substantial, and it was stipulated that the automotive parts jobbing business is highly competitive and involves small net profit margins (Pet. App. 68).

Petitioner, however, questions the nature of the competitive advantages accruing to the favored WD-jobber customers in the present case, claiming that they are not readily measurable "in dollars and cents" (Pet. 12). But it is apparent that these purchasers can utilize the profits derived from their greater discounts in a variety of ways: existing jobbing facilities and services can be improved; more countermen or salesmen employed; additional jobbing branches opened; losses incurred in other aspects of the business can be subsidized; or the additional profit can simply be pocketed by the individuals who own or control the enterprises.[7]

[7] There is no merit to petitioner's contention (Pet. App. 13) that the Commission's order is unduly vague. The Commission, of course, has broad discretion to determine the appropriate scope and form of its orders (see *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392–393), and the court of appeals specifically considered and rejected petitioner's challenge to the order (Pet. App. 7a). If a situation should ever arise in which petitioner is unable to determine whether particular sales would violate the order, it may always seek advice thereon from the Commission. See *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394.

CONCLUSION

The decision of the court of appeals is correct. There is no conflict among the circuits, and the decision below accords with the pertinent administrative and judicial precedents. There is accordingly no occasion for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMES MCI. HENDERSON,
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Assistant General Counsel.

THOMAS F. HOWDER,
Attorney.

JANUARY 1966.

I authorize the filing of the foregoing brief in opposition. I shall shortly file a memorandum setting forth the views of the United States on this case.

THURGOOD MARSHALL,
Solicitor General.

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SUPREME COURT, U. S.

No. 565

In the
Supreme Court of the United States
OCTOBER TERM, 1965.

MONROE AUTO EQUIPMENT COMPANY,
a Michigan corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR FEDERAL TRADE COMMISSION IN OPPOSITION.

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PETITIONER'S REPLY TO BRIEF FOR FEDERAL TRADE COMMISSION IN OPPOSITION.

A Question of Law Is Presented Here.

In its Brief in Opposition, the Federal Trade Commission has persisted in the misunderstanding and misconstruction of the issues in which both it and the Seventh Circuit indulged in earlier stages of this matter.

The first of these is a confusion of matters of fact with matters of law. This is initially apparent in the "Questions Presented" section of the Brief (page 2), which states in part that one question is "whether there was *substantial evidence* to support the Commission's findings (a) that petitioner discriminated in price in granting affiliated

warehouse distributor-jobber purchasers the 20% warehouse distributor discount on products which they purchased for resale at the jobbing level, while competing independent jobbers were required to purchase at prevailing jobber prices; * * *."

Whether so designed or not, this statement might give this Court the impression that it is being asked to review a mere matter of the "weight of the evidence," when such is not the case. It was never disputed that all jobbers (affiliated or not) paid the same price, that all warehouse distributors paid the same price, and that warehouse distributors were allowed a 20% discount on their resales to all jobbers, including those under various degrees of common ownership with the warehouse distributors. On this point, there is no question of "substantial evidence" involved. The question is whether the 20% discount, under these circumstances, is a price discrimination cognizable under the Robinson-Patman Act. This is a question of law, not of fact. Even assuming for the sake of argument that the evidence established that some economic benefit was bestowed upon a few jobbers as the result of common ownership with a warehouse distributor, there remains unanswered the question of whether such an economic benefit, *in the legal contemplation of the statute,* is equivalent to the prohibited discrimination in price.

This is the legal question involved, and it is one which the Commission refuses to recognize. In this connection, it has closed its eyes to the only two relevant cases—*Nuarc Company* v. *Federal Trade Commission,* 315 F2d 576, 582 (7th Circuit, 1963) and *Central Retailer-Owned Grocers, Inc.* v. *Federal Trade Commission,* 319 F2d 410, 415 (7th Circuit, 1964), discussed at pages 9-10 of our Petition.

There Is No "Economic Benefit".

Additionally, the petitioner contends that the record does not support a finding that there was in fact any "economic benefit" (Pet'n. page 13). The Commission's statement of the supposed benefit (Brief, page 11) is entirely imaginary, and has no support in the record.

The Commission's Analysis of The Law Is In Error.

The Commission's statement (Brief, Page 7) that the "law is clear" is entirely unwarranted. That its citation of *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475 is inapposite has been demonstrated in our Petition (page 8). Its reliance on the cases cited in its footnote 5 on page 8 is equally misplaced, since those cases involved entirely different situations. We discussed and distinguished *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F2d 152 (7th Circuit, 1956), *cert. den.* 355 U.S. 941 at page 11 of our Petition. In *Firestone Tire & Rubber Co.*, 55 F.T.C. 1759, the "warehouse distributor" was a jobber merely using a warehouse trade name to induce discounts. And in *Sherwin-Williams Co., et al,* 36 F.T.C. 25, the Commission dismissed the part of the complaint most relevant to the present situation.

Paragraph 17 of the Sherwin-Williams Complaint charged that Lucas & Co. sold paint to Union Hardware Co., Atlantic Distributing Co., and American Hardware Supply Co. at wholesale prices; that persons having financial interests in or control of these wholesale distributing companies also had financial control of retail hardware and paint stores (either as proprietor, partner, or stockholder). It was contended that the granting of the wholesale price to the distributors on paint resold to such financially related retailers was tantamount to granting

the wholesale price to such retailers. The Commission ordered that the charges set out in this Paragraph of the complaint be "dismissed without prejudice to the right of the Commission to proceed thereon in the future in any appropriate manner." (36 F.T.C. at page 75). Thus, it there refused to take a position on the question of whether sales may be made at wholesale prices to a distributing company for resale to financially affiliated retailers which is the very point involved in this appeal.

It is noteworthy that, in the case now before this Court, the Commission has not previously relied on the cases now cited in footnote 5; at least *Edelmann* is the only one it cited in the Seventh Circuit.

Finally, it is difficult to understand another of the Commission's citations—that of *American News Co.* v. *Federal Trade Commission,* 300 F2d 104 (2nd Circuit, 1962), *cert. den.* 371 U.S. 824,—as it is used on page 9 of its Brief. That case clearly demonstrated the proposition for which we cited it—that the indirect purchaser fiction should be resorted to *only* where its use is necessary to correct drastic situations (Pet'n. pp 10-11). *American News,* as the Circuit Court therein remarked, involved a "*classic example* of the *misuse* of the economic power possessed by large buyers." (300 F2d at 107).

Conclusion.

The Federal Trade Commission has failed to meet the points presented in our Petition, which demonstrated the necessity for this Court's reviewing the decision of the Seventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 565

MONROE AUTO EQUIPMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

The Federal Trade Commission brought this proceeding under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), charging petitioner ("Monroe") with practicing illegal price discrimination among jobbers who handle its merchandise. Section 2(a) makes it "unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition * * *."

799-214—66

Monroe manufactures automobile replacement parts. It sells these parts to so-called warehouse-distributors, who sell them to jobbers who, in turn, distribute the parts among retail dealers. All warehouse-distributors who resell Monroe parts to "approved" jobbers at Monroe's suggested "net jobber" prices [1] pay the same price to Monroe. This price is 20 percent less than the suggested "net jobber" price which jobbers pay to the warehouse-distributors, the 20 percent differential representing the warehouse-distributors' compensation (Pet. App. 66–67 [2]).

The Commission's charges of discrimination arise out of the following additional facts: Some of the warehouse-distributors in Monroe's chain of distribution own or control approved jobbers. Some approved jobbers, on the other hand, own or control warehouse-distributors. These "affiliated" jobbers who either control, or are controlled by, warehouse-distributors are in direct competition with "independent" jobbers who have no ownership affiliation with warehouse-distributors and who constitute by far the majority of the jobbers. The independent jobbers pay the suggested "net jobber" price for Monroe's merchandise. The affiliated jobbers also formally pay that price when buying from the warehouse-distributors with whom they have affiliation, but such warehouse-distributors receive the standard 20 percent resale discount on the goods (Pet. App. 67–68).

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[1] Such resales to "approved" jobbers at Monroe's suggested prices are the only ones involved in this case.

[2] "Pet. App." refers to petitioner's appendix in the court of appeals.

On the basis of these facts, the Commission found that Monroe was engaging in price discrimination among purchasers of Monroe's products within Section 2(a)—specifically, that such discrimination existed with regard to jobbers handling Monroe merchandise. The Commission first found that all approved jobbers—whether "independent" or affiliated with warehouse-distributors—were "purchasers" from Monroe within the meaning of Section 2(a). It found the "independent" jobbers to be "indirect" purchasers from Monroe through the warehouse-distributors with whom such jobbers deal because "[t]he prices, terms and conditions of sale used by both the * * * [warehouse-distributor] and the jobber are fixed by the manufacturer [Monroe] or are subject to its approval. See *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962) cert. denied, 371 U.S. 824 (1962)" (Pet. App. 18). The affiliated jobbers were found to be "direct" purchasers from Monroe because "the entity composed of * * * [warehouse-distributor] and jobber is a direct purchaser" (Pet. App. 19).

The Commission then held that "the sole remaining question is whether there is sufficient identification of the * * * [warehouse-distributor] with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other" (*ibid.*). The Commission found that, "in the light of the business realities shown on this record," a "direct benefit" would inure to the affiliated jobbers (Pet. App. 25) and that these facts "amount to a prima facie show-

ing of price discrimination among competing [jobber] customers" which Monroe had not rebutted. Finally, the Commission adopted the examiner's conclusion that the effect of these discriminations may be substantially to lessen or injure competition between the affiliated and unaffiliated jobbers (Pet. App. 13, 26). The Commission entered an order directing Monroe to cease and desist "from discriminating in the price of * * * products of like grade and quality * * * [b]y selling such products to any purchaser at net prices higher than its net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price" (Pet. App. 15).[2]

The court of appeals affirmed on the ground that the Commission's findings were supported by substantial evidence (Pet. 1a–7a).

DISCUSSION

The Solicitor General has authorized the Federal Trade Commission to file a separate brief in opposition to the petition for a writ of certiorari in this case. While the Solicitor General agrees with the Commission that the present case does not warrant further review, he deems it appropriate to file this memorandum because, in his view, the Commission's decision suggests an interpretation of the Robinson-Patman Act that could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical

[2] Commissioner Dixon filed a concurring opinion (Pet. App. 27) and Commissioner Elman dissented (Pet. App. 31).

integration of concerns engaged in the wholesale and retail distribution of merchandise.

The Commission's decision that Monroe violated Section 2(a) of the Robinson-Patman Act depends upon its conclusions that Monroe has discriminatorily conferred an economic benefit upon some of its jobbers (the "affiliated" jobbers) which it denies to others (the "independent" jobbers) and that the effect of this benefit may be substantially to lessen competition among jobbers. In the Commission's view, prohibited discrimination existed because the evidence established that affiliated jobber-warehouse-distributors "operate as a single unit so that any benefit conferred on one would in the light of the business realities shown on this record, result in a direct benefit to the other" (Pet. App. 25). Since all warehouse-distributors received a benefit—the 20 percent resale discount—not given to independent jobbers, the Commission concluded that the jobbers affiliated with warehouse-distributors received a prohibited economic benefit which the independent jobbers did not receive.

The Commission's analysis in this case thus seems to rest upon the assumption that, where a substantial ownership affiliation exists between a warehouse-distributor and a jobber, all or substantially all of the 20 percent resale discount to the warehouse-distributor will constitute economic benefit to the affiliated jobber, with resultant anticompetitive effects. The 20 percent discount, however, is nominally given in return for the performance of warehousing and distributing functions which would otherwise have to be performed

by Monroe. The Commission's opinion does not suggest that these functions are not carried out by warehouse-distributors when they resell to affiliated jobbers; nor does it suggest that the 20 percent discount exceeds the normal costs of warehousing and distributing in the industry.

Should the 20 percent discount reflect the normal costs of warehousing and distributing on sales to affiliated jobbers, it would be difficult indeed to conclude that competitive injury cognizable under the Robinson-Patman Act has resulted. On the other hand, if the difference which Monroe maintains between the resale price to jobbers and its price to warehouse-distributors[4] is greater than is warranted by the function performed by the warehouse-distributor, vertical integration between a jobber and a warehouse-distributor might well result in a substantial competitive advantage to affiliated jobbers as compared with independent jobbers who are forced to pay an unreasonably high price increment to the warehouse-distributors from whom they buy.

These issues, when properly presented, deserve consideration and analysis. The Commission did not make what we consider to be the relevant inquiries here, possibly because the record in this case may not have seemed to require it. However, if the Commission intends to rely entirely upon a formal analysis which assumes that an unlawful competitive advantage would

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[4] The Commission here found that the "prices, terms and conditions of sale used by both the * * * [warehouse-distributor] and the jobber are fixed by * * * [Monroe] or are subject to its approval" (Pet. App. 18).

be gained *per se* by a jobber with ownership affiliation with a warehouse-distributor, regardless of whether the price differential maintained between jobbers and warehouse-distributors reflects normal distribution costs, serious questions would be raised; such an application of the Robinson-Patman Act might well discourage vertical integration in the distribution process even where it yields beneficial economies and results in no undue injury to competition.

The Solicitor General nevertheless agrees with the Commission that the present case is not an appropriate one for review here. The relevant factual information is not discussed in the Commission's opinion; nor did the petitioner attempt to develop such information in the administrative proceeding. The record therefore does not satisfactorily present the legal issues. The legal questions are, moreover, neither explored nor illuminated in the court of appeals' opinion, which affirmed the Commission on the basis of the substantial evidence rule. We note further that in a recent opinion dealing with another, and possibly more significant, form of vertical integration—the formation of cooperatives of retail or jobbing outlets for the purpose of performing the warehousing or wholesaling function for the members of the cooperative—the Commission has extensively explored the relevant facts on remand from the Court of Appeals for the Ninth Circuit (see *Alhambra Motor Parts* v. *Federal Trade Commission,* 309 F. 2d 213, *Alhambra Motor Parts,* FTC Docket No. 6889, issued January 3, 1966). And in *Purolator Products, Inc.*

v. *Federal Trade Commission*, No. 14704, C.A. 7, decided October 22, 1965, the Court of Appeals for the Seventh Circuit has, more recently than in the present case, engaged in a more extensive analysis of the relevant legal issues. In these circumstances, review of the underlying issues here would, we believe, be premature.

Respectfully submitted.

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